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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/062,974	01/31/2002	Massimiliano Antonio Poletto	12221-01101	2836
26161	7590	09/23/2004	EXAMINER	
FISH & RICHARDSON PC 225 FRANKLIN ST BOSTON, MA 02110			WRIGHT, NORMAN M	
			ART UNIT	PAPER NUMBER
			2134	

DATE MAILED: 09/23/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/062,974

Applicant(s)

POLETTA ET AL.

Examiner

Norman M. Wright

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 24 December 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-32 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 4/12/24/03.

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

  
NORMAN M. WRIGHT  
PRIMARY EXAMINER

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

The rejections with respect to 112<sup>nd</sup> paragraph are withdrawn. Applicant is reminded that an apparatus must be distinguished from the prior art in terms of structure rather than function. Additionally, with respect to the manner in which a claimed apparatus is intended to be used, it does not differentiate from a prior art apparatus. See MPEP 2114.

### ***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-32 are rejected under 35 U.S.C. 102(e) as being anticipated by US patent application, number 2002/0035683 A1, Kaashoek et al., hereinafter '683.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

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As to claims 1-25, '683 teach the claimed invention having: a monitoring device/gateway, a plurality of probes/data collectors of gateway, collecting statistical information, a data center, network, joining, victim data center, cluster head (collectively 27, 33), hardened interface (30), install filters, determining a denial of service attack, communication, deployed inline and out of line, dedicated/private network (see abs., background, summary, figs. 1-4, 5-6, 9, and cols. 1-5 et seq.).

As to claims 26-32, '683 teach probes coupled between network and a data center, scaleable/dynamic/redundant probes/filters/data collectors, randomly monitored packets, over a link. See '683 at abs., fig. 2 (30, 38), fig. 3 (30, 20, peering point), col. 1, par. 0020, col. 2, par. 0026-0030 et seq., 0032-0034, clms 1,4, 6-9, 12-14, 17, 21, and 27.

3. Similarly, claims 1-32 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. 2002/0032774 A1, see disclosure.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

As to claims 1-25, '774 teach the claimed invention having: a monitoring device/gateway, a plurality of probes/data collectors of gateway, collecting statistical information, a data center, network, joining, victim data center, cluster head (collectively

27, 33), hardened interface (30), install filters, determining a denial of service attack, communication, deployed inline and out of line, dedicated/private network (see abs., background, summary, figs. 1-4, 5-6, 9, and cols. 1-5 et seq.).

As to claims 26-32, '774 teach probes coupled between network and a data center, scaleable/dynamic/redundant probes/filters/data collectors, randomly monitored packets, over a link. See '774 at abs., fig. 2 (30, 38), fig. 3 (30, 20, peering point), col. 1, par. 0022, col. 2, par. 0028-0032 et seq., 0034-0036, clms. 1,4, 6-9, 12.

4. Similarly, claims 1-32 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. 2002/0032880 A1. See disclosure.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

As to claims 1-25, '880 teach the claimed invention having: a monitoring device/gateway, a plurality of probes/data collectors of gateway, collecting statistical information, a data center, network, joining, victim data center, cluster head (collectively 27, 33), hardened interface (30), install filters, determining a denial of service attack, communication, deployed inline and out of line, dedicated/private network (see abs., background, summary, figs. 1-4, 5-6, 9, and cols. 1-5 et seq.).

As to claims 26-32, '880 teach probes coupled between network and a data center, scaleable/dynamic/redundant probes/filters/data collectors, randomly monitored packets, over a link. See '880 at abs., fig. 2 (30, 38), fig. 3 (30, 20, peering point), col. 1, par. 0021, col. 2, par. 0025-0031 et seq., 0032-0035, clms. 1, 4, 9.

### ***Double Patenting***

5. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

6. Claims 1, 4, 8-10, 13, and 16, are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1, 3-4, 6-8, 12-15, 17, and 26-27 of copending Application No. US 2002/0035683 A1, hereinafter '683. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

7. Alternatively, claims 1, 4, 8-10, 13, and 16, are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1, 3-4, 6-8, 12-15, 17, and 26-27 of copending Application No. US 2002/0035683 A1, hereinafter '683. Although the conflicting claims are not identical, they are not patentably distinct from each other because, the monitoring devices and/or probe or plurality of probes devices are monitors that are statistical collectors in both

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applications. Similarly, the cluster heads are in fact the controllers/centers for the monitor/probes in both applications. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the invention of US application '683, by labeling the cluster heads as controllers/centers, and the probe devices/monitors as statistical collectors/monitors as recited in the disclosure. One of ordinary skill in the art would have been motivated to perform such a modification because it involves only the aspect of labeling the functions of the device and not modifying its structure. One of ordinary skill in the art would have seen this as an obvious expedient to renaming the function of the device/apparatus/system, while retaining the original functions.

### ***Response to Arguments***

1. Applicant's arguments filed 12/24/03 have been fully considered but they are not persuasive. Applicant remarks that the prior arts fail to teach the features of a monitoring device, a plurality of probes collecting statistical information from data packets on a network, cluster heads coupled to said probes, and determining whether there is a denial of service attack on the data center, the examiner does not concur. The examiner would like to indicate that the two networks in which the inventions are to be used, '974 and the prior art are structurally the identical. Therefore, an identical device is inherently capable of performing the same functions, regardless of what the devices are labeled. See figures 1-3, 5-6 and par. 0020-21 et seq. of '880, and present disclosure '974. Additionally, the monitoring device of '974 (element 26) is a gateway, see also pg. 3, lines 20-21. Similarly, monitor of '880 is a gateway (element 26), and

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col. 2, par. 0022. The probes (26a-26n) of '974, which are a part of the gateway (26), perform the functions of sampling packets and collecting statistical information of packets (fig. 2, pg. 7, lines 10 et seq.); similarly, see '880 at col. 2, par. 0023. The clustered heads of '974 are connected to the probes (pg. 7, lines 2 et seq.), similarly, figs. 1-3, 6, and col. 2, par. 0030 et seq.. As to the remarks that the instant invention '974 and the prior art are germane to different inventions the examiner does not concur. Both the instant application and the prior art recites inventions that may be utilized in a distributed environment for the detection of a denial of service attack, see above.

2. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

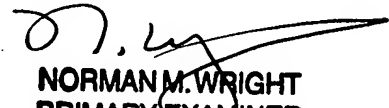


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Any inquiry concerning this communication should be directed to Norman M. Wright at telephone number (703) 305-9586.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Norman M. Wright whose telephone number is (703) 305-9586. The examiner can normally be reached on Mondays from 8am to 5 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Greg Morse, can be reached on (703) 308-4789. The fax phone number for the organization where this application or proceeding is assigned is (703) 746-7240. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 305-3900.

  
**NORMAN M. WRIGHT**  
**PRIMARY EXAMINER**